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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JAMEL LAVONE WILLIAMS, Defendant and Appellant.	A145678 (Contra Costa County Super. Ct. No. 05-141913-4)

Pursuant to a plea agreement defendant Jamel Lavone Williams pleaded no contest to shooting at an occupied vehicle (Pen. Code, § 246; count three)[1] and two counts of assault with a firearm (§ 245, subd. (a)(2); counts four and five). Defendant additionally admitted a personal firearm use enhancement (§ 12022.5, sub. (a)) in relation to count four. He was sentenced to 13 years in state prison (midterm of three years on count four plus an additional 10 years for the personal use enhancement) with his sentences for count three and count five to run concurrently. Defendant received 375 days' credit for time served and was ordered to pay various fines and fees. He appeals from an order denying his motion to withdraw his no contest plea.

FACTUAL AND PROCEDURAL BACKGROUND

We recite only the facts relevant to the issues on appeal. An information filed by the Contra Costa County District Attorney alleged defendant shot at an occupied motor vehicle (§ 246; count one); committed three counts of assault with a firearm (§ 245, subd. (a)(2); counts two through four); was a felon in possession of a firearm (§ 29800,

[1] All further statutory references are to the Penal Code.

subd. (a)(1); count five); and illegally possessed ammunition (§ 30305, subd. (a); count six). The information further alleged defendant personally used a firearm in connection with counts two, three and four (§ 12022.5, subd. (a)); had been convicted of a serious felony prior to the instant offenses (§§ 667, subds. (a)(1), (b)–(i), 1170.12) and that they were serious and violent felonies within the meaning of section 1192.7, subdivision (c); and suffered a prior prison conviction (§ 667.5, subd. (b)). In an amended information, the district attorney added three additional counts of attempted murder (§§ 187, subd. (a), 664; counts one through three) with attached enhancements that defendant personally used and intentionally discharged a firearm (§§ 12022.53, subds. (a) & (b), 12022.5, subd. (a)).

Defendant, represented by retained counsel David Kelvin, filed a section 995 motion as to counts one through three of the amended information pursuant. The court, over the People's objection, granted the motion as to count three, but denied it as to all other counts. The prosecution filed a second amended information to reflect the dismissal of count three.

Soon after trial commenced, defendant, pursuant to a plea agreement, pleaded no contest to count four (assault with a firearm) and admitted the attached enhancement, as well as to counts three and five without the enhancements as to those counts. The prosecution agreed to dismiss all other charges and to not pursue charges against defendant based on two other shootings and any related jailhouse calls defendant made. The plea was made with the understanding defendant would be sentenced to the midterm of three years on count four and to the aggravated 10-year term for the attached enhancement, for a total of 13 years, while the sentences for counts three and five would be served concurrently.

After the court found there was a factual basis for the plea, it continued the matter for sentencing. However, before sentencing, the trial court relieved retained counsel Kelvin and referred defendant to the public defender's office after receiving letters from defendant and his family addressing concerns about Kelvin's representation. Conflict

counsel was later appointed and subsequently filed a motion to withdraw defendant's no contest plea which the People opposed.

Kelvin's Testimony

At the hearing on defendant's motion to withdraw his plea, Kelvin testified as follows: He had practiced law for 35 years and around 80 percent of his caseload involved criminal matters, he had handled roughly 50 serious felony cases and had been involved with 25 to 30 jury trials. In one case, the trial court found he provided ineffective assistance, but the court denied a new trial.

Defendant retained Kelvin sometime before the preliminary hearing. Kelvin met with defendant more than once, but less than 10 times.

Kelvin told defendant he was going to have to take the plea because "the math was not favorable." "[T]he exposure was over 60 years. And regardless of the merits of the case, the statistics are that 'not guilties' are rare birds."

When asked if he had threatened defendant with any consequences if he did not take the plea, Kelvin said, "Sure. I threatened him. I told him he would die in prison." He thought a guilty verdict was "extremely likely," not because of the weight of the evidence, but because "[j]uries like to convict." When the court asked Kelvin if he had coerced defendant into entering the plea, he responded, "Well, I didn't use any force or violence. I only spoke words to him. But my words were that he had to do this." When asked to explain what he meant by saying that defendant " 'had to' " enter the plea, he said, "Well, I think the analogy I used was, if you play Russian roulette, that that's a bad gamble. If there is no round in the chamber, you win, that is great. If there is a round in the chamber, you blow your brains out. He can't run that risk. I told him he couldn't do it." Although he did not recall, he thought he told defendant "that he could conceivably get an acquittal on this, but I was not prepared to run the risk. I'm sorry. I got scared. That's what happened."

Kelvin responded, "[y]es" when asked "when you are saying that you had told [defendant] he had to do something, are you indicating that that's because strategically you felt that was the best outcome for him, your client?" He further stated the only

consequence he mentioned about defendant pleading or not pleading was the exposure of the amount of prison time defendant would face if he were found guilty.

The court asked if "Given what you knew at the time did you believe his plea was knowing and voluntary?" Kelvin responded, "Yes. He knew what he was doing." When asked if defendant would have entered the plea if Kelvin "had allowed him any sort of decision making," Kelvin said, "I told him he had no choice, that he had to take the deal because of the consequences of going to trial were just—it wasn't something that any rational person would run that risk. [¶] . . . [¶] . . . He could have said 'no,' but he would have had to ignore the advice of his attorney to do that." Kelvin never told defendant not to raise any concerns about the plea with the court, and it was his belief his plea was knowing and voluntary, "[a]s the law defines that term . . . ."

Kelvin rejected an offer for 15 years in state prison and negotiated up until the second day of trial to obtain the 13-year offer. He "thought the two years tipped the balance."

Defendant's Testimony

Defendant testified he pleaded no contest because Kelvin told him to do so. Kelvin told him "if [he] did not, [he] would—be facing life," and he "felt like [he] had no choice." Defendant said he had been untruthful in replying, "[n]o," when the court asked him if he was being forced to enter the plea. Defendant admitted, however, that he took entering the plea seriously, recognized going to prison would be a consequence of entering a no contest plea, had previously filled out the felony advisement of rights waiver and plea form, and had previously pleaded no contest on three separate occasions (once to a felony charge and twice to misdemeanors). He further admitted he had met with Kelvin three times in court and twice at the jail.

Court's Ruling

In ruling from the bench, the court commenced by stating defendant had to "establish by . . . clear and convincing evidence that there is good cause to vacate his plea." "[T]he critical fact here," said the court, was "did Mr. Kelvin do anything at all that compromised [defendant's] ability as an adult to understand what the plea agreement

was that was offered to him and that he was being strongly urged . . . to accept and was misled in some way because he didn't have all of the available information that would have been relevant to his decision to enter a plea and I don't see—I don't see that." In fact, as the court saw it, "Mr. Kelvin was a vigorous advocate for his client in negotiating a plea," citing his rejection of the 15-year offer and getting the lower 13-year deal.

The court further stated, "while I don't necessarily applaud Mr. Kelvin for the manner in which he may have gone about [counseling defendant to take the plea agreement,] . . . [¶] [and t]he fact that Mr. Kelvin described it as arm twisting and words to that effect, while I wouldn't praise him for using that language and perhaps it was inadvertently arm twisting in a way, even that I think falls within the boundaries of effective representation of your client if the only way to communicate to the client is that the consequence of not pleading guilty is horrendous." And, "to the extent that [defendant] had any reservations or hesitations about entering the plea, wanted to go to trial, he had numerous opportunities in the course of plea play colloquy to tell me he had that question or reservation, wanted to talk to his lawyer about that situation, wanted to say something on the record in court, and repeatedly answered questions in the negative." Finally, the court stated, "Even if Mr. Kelvin in a way acted coercively, it was clear to me during the plea colloquy that [defendant] understood he had a choice. He may not like his two choices, going to trial and facing a long time and a sentence of more than 13 years, but his choices were limited, but he understood he had a choice."[2]

At the sentencing hearing, consistent with the negotiated disposition, the court imposed a 13-year prison term, awarded 375 days' credit for time served, and imposed various fine and fees.

DISCUSSION

"A defendant who seeks to withdraw his guilty plea may do so before judgment has been entered upon a showing of good cause. [Citations.] 'Section 1018 provides that

[2] The court noted defendant faced "life or something tantamount to life in prison" if he went to trial and was convicted versus the 13 years he now faced as result of the plea, calling it "a substantial reduction in the potential sentence."

. . . "On application of the defendant at any time before judgment . . . the court may, . . . for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted." Good cause must be shown for such a withdrawal, based on clear and convincing evidence. [Citation.]' [Citations.] 'To establish good cause, it must be shown that defendant was operating under mistake, ignorance, or any other factor overcoming the exercise of his free judgment. [Citations.] Other factors overcoming defendant's free judgment include inadvertence, fraud or duress. [Citations.]' [Citation.] 'The burden is on the defendant to present clear and convincing evidence the ends of justice would be subserved by permitting a change of plea to not guilty.' " (*People v. Weaver* (2004) 118 Cal.App.4th 131, 145–146.) However, a plea may not be withdrawn " 'simply because the defendant changed his mind.' " (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208.)

We review a trial court's denial of a motion to withdraw a plea for abuse of discretion. (*People v. Holmes* (2004) 32 Cal.4th 432, 442–443.)

Abuse of Discretion Claim

Defendant contends he met his burden of proving by clear and convincing evidence there was good cause to withdraw his plea and the trial court abused its discretion in refusing to allow him to do so. He maintains "[he] was under significantly greater duress than other defendants facing serious felony charges," and that he was forced to enter the plea because Kelvin " 'twisted his arm' " and was frightened of going to trial. "An abuse of discretion is found if the court exercises discretion in an arbitrary, capricious or patently absurd manner resulting in a manifest miscarriage of justice." (*People v. Shaw* (1998) 64 Cal.App.4th 492, 496.)

Defendant complains his counsel "used threats and extreme analogies such as Russian roulette to coerce [him] into taking the plea." Kelvin acknowledged the Russian roulette analogy: "[I]f you play Russian roulette, that that's a bad game. If there is no round in the chamber, you win, that is great. If there is a round in the chamber, you blow your brains out. He can't run that risk. I told him he couldn't do it." Kelvin also admitted saying defendant could die in prison if convicted and sentenced on all counts,

explaining he thought it was "extremely likely" defendant would be found guilty if he went to trial and he believed the plea was in defendant's best interest.

While defendant maintains Kelvin "feared" going to trial, the court found no evidence of that. "I did not hear from Mr. Kelvin, nor did I infer from anything that he said, that he was afraid of going to trial because of his own personal angst about having to be a lawyer in the middle of trial and his concerns about being embarrassed or whatever. My only interpretation of his testimony was that he was concerned about what would happen when the jury returned a verdict." Further, there was "no other evidence that suggests to me that his fear of going to trial was such that it effected in any way, shape, or form in any significant way the plea negotiations or the actual offer that was accepted."

On this record, then, there was no abuse by the trial court in denying defendant's motion to withdraw his plea. The transcript shows defendant was fully aware of his plea. He signed a felony advisement of rights waiver and plea form and testified he did not have any questions or need any clarification on anything he had initialed on the form. When asked if he was being forced to enter the plea, he stated "No," and additionally stated he was entering into the plea freely and voluntarily. He also stated he understood he would receive 13 years along with a 10-year parole term after he completed his prison term. Kelvin's analogies and statements were simply not such as would necessarily overcome defendant's exercise of his free judgment. As the trial court stated, "his choices were limited, but he understood he had a choice." (See *People v. Huricks*, *supra*, 32 Cal.App.4th at p. 1208 [Noting, a plea may not be withdrawn " 'simply because the defendant has changed his mind.' "].)

Ineffective Assistance of Counsel Claim

To establish ineffective assistant of counsel, "the defendant must first show counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice . . . . When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel

acted within the wide range of reasonable professional assistance." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.)

Defendant complains Kelvin failed to have a defense strategy, misadvised him on the availability of a witness, did not investigate impeaching that witness, did not intend on calling any witnesses, and failed to give him adequate information about his custody credits and parole term.

As to the alleged lack of strategy and investigation, the trial court noted both time and funds had been provided for an investigator. It also "[had] not heard anything today that suggests to me that Mr. Kelvin fell down on the job in any material way. [¶] . . . [¶] Nothing in the pleadings and you indicated to me [suggests] that there is some new and different evidence unknown to Mr. Kelvin where if he would have bothered to find out about it, it might have changed the whole complexion of the case." Indeed, the court went on to talk about the evidence assertedly weighing in defendant's favor—a witness identifying another as the shooter versus multiple witnesses identifying defendant as the shooter—and the "litigation risk" if the case proceeded to trial.

In regard to witnesses, there was some question about the availability of a key prosecution witness and whether her out-of-court statements would be allowed into evidence. The court had not yet held a hearing on her availability, however, and, in the court's view, a "lawyer's representation of the client about the availability of or non-availability of the witness in the consequences as far as the trial evidence is concerned is, in almost all instances, not going to be something that is going to call into question the basic effectiveness of the attorney's representation of the client on a guilty plea." Defendant also claimed Kelvin misadvised him as to his ability to confront this witness. The court expressed "serious doubt" defendant could have concluded that was the case from anything Kelvin said, given that the issue of availability had yet to be decided. As for alleged impeachment of this witness, the court observed defendant was aware of her criminal history and issues implicating her credibility. Finally, as for defense witnesses, when the People filed their witness list, Kelvin noted the omission of a key defense witness and added that name to the list orally in court on the same day.

After hearing the testimony of both defendant and Kelvin, the trial court simply did not believe Kelvin had done "anything at all that compromised [defendant's] ability as an adult to understand what the plea agreement was that was offered to him . . . ." Further, the court viewed Kelvin as "a vigorous advocate" for defendant, counsel having negotiated the plea deal down to 13 years instead of the originally offered 15-year deal. The court added that Kelvin based his decision to recommend the plea deal on three factors: defendant faced two attempted murder charges, a personal firearm use enhancement, and an allegation of a prior strike. "Under most circumstances, if all three of those things are found beyond a reasonable doubt true by the jury, [defendant] is looking at life or something tantamount to life in prison." Looking at the severity of that sentence, in the court's view, counsel made a tactical decision to take a plea that was a "substantial reduction in the potential sentence." (*People v. Holt* (1997) 15 Cal.4th 619, 703 ["A court reviewing the conduct of counsel must in hindsight give great deference to counsel's tactical decisions."].)

Finally, as to defendant's contention that Kelvin failed to adequately advise him as to the parole term and custody credits, defendant initialed on the plea form that he understood his sentence would be followed by a parole term and his conduct credits were "limited to a maximum of 15%." The trial court further advised defendant when taking his plea that "[o]nce you are done serving [your] sentence, you will also be exposed to being on parole for ten years." And when the court asked if he understood, defendant responded, "[y]es." Finally, at no point during the plea hearing did defendant mention he was unaware of the parole term or had question about custody credits, nor did he question Kelvin about parole and custody credits when he had the opportunity to do so.

In sum, counsel's performance did not fall below an objective standard of reasonableness. (*People v. Mai, supra*, 57 Cal.4th at p. 1009.) We therefore need not, and do not, reach the issue of prejudice.

DISPOSITION

The judgment is affirmed.

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Banke, J.

We concur:

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Margulies, Acting P. J.

_____
Dondero, J.